



# THE ATTORNEY GENERAL OF TEXAS

AUSTIN 11, TEXAS

July 25, 1957

**WILL WILSON**  
ATTORNEY GENERAL

Honorable Sam Lee  
District Attorney  
Brazoria County  
Angleton, Texas

Opinion No. WW-176

Re: Does the Retrieve State Farm, a unit of the Texas Prison System, have the authority to run a fence across Buffalo Camp Bayou at a point entirely within the prison owned property?

Dear Sir:

In your letter dated May 24, 1957, requesting our opinion, you ask the following question and stated in part the following facts:

"The question is: Does the Retrieve State Farm, a unit of the Texas Prison System, have the authority to run a fence across Buffalo Camp Bayou at a point entirely within the prison owned property?

"The prison system owns the land on both sides of the Buffalo Camp Bayou. Buffalo Camp Bayou empties into the Brazos River and from its mouth to the point of the fence is more than 30 feet in width.

"Neither the S.F. Austin nor the Jared E. Groce Original Grants make any mention of Buffalo Camp Bayou, and, therefore, do not except Buffalo Camp Bayou from the original grants. The deed from the owners who conveyed the property, now known as Retrieve State Farm, to the State of Texas on the 1st day of February, 1918, does not mention

Buffalo Camp Bayou nor except it from that conveyance.

"Therefore, the State did not reserve any record title to Buffalo Camp Bayou. However, the Congress of the Republic of Texas, in 1837, enacted a statute stating in part as follows: 'All streams so far as they retain an average width of 30 feet from the mouth up shall be considered navigable streams within the meaning hereof and they shall not be crossed by the lines of any survey.'

"This statute is carried forward as Article 5302 of the Revised Civil Statutes of Texas."

Navigable streams within this State are beyond question the highways of the State and subject to the exclusive control of the Legislature and may either be wholly or partially obstructed if in the Legislature's judgment the public interest will be promoted by so doing. Felman v. Wolfe, 27 Tex. 68 (1863). We have been unable to find any legislative enactment which would authorize the Texas Prison System to obstruct a navigable stream.

As cited in the statement of facts contained in your letter, Article 5302, V.C.S., defines a navigable stream within this State as a stream with an average width from the mouth up of thirty feet. Assuming for the purposes of this opinion, that the bed of Buffalo Camp Bayou has been relinquished by the Legislature under the authority of Article 5414a, V.C.S., popularly known as the "Small Act", the right to the water within the stream was not affected. This statute contains the following provisions:

"Provided that nothing in this act contained shall impair the rights of the general public and the State in the waters of streams or the rights of riparian or appropriation owners in the waters of such streams."

Therefore, it is our opinion that the "Small Act" did not provide legislative authority for the owners of beds of navigable streams to obstruct the same nor to exclude the general public therefrom.

In Tyler v. Gonzales, 189 S.W.2d 519 (Civil Appeals, 1945, writ ref.), the court held that a landowner (the land was assumed by the court to come under the "Small Act") could run a fence to the middle of a stream and then run the fence down the thread of such stream. In this case the court said, after stating there was no evidence to show the fence constituted a nuisance, "We take it therefore that appellees are not contemplating the construction of a fence which would pass to the east of the thread of the stream. The attempted construction across the bed of the stream would raise the further and additional questions which are not discussed in this opinion."

It is our opinion that the restrictive reservation in the "Small Act" reserving the rights of the general public to the waters of the streams of this State did not change the existing law relating to the obstruction of navigable streams. In addition, the use of streams for transportation has long been considered one of the primary rights of the general public to the waters of this State and is protected by Article 783, Penal Code, which provides a fine of not less than Fifty nor more than Five Hundred Dollars for whoever shall obstruct any stream in this State which is navigable in fact.

Therefore, regardless of whether the Texas Prison System owns the bed of the stream under the provisions of the "Small Act", we conclude that there is no authority by which the Prison System may maintain a fence across such stream and exclude the general public from the use of the waters of such streams for navigation, fishing or any other legal use. The Supreme Court held in Diversion Lake Club v. Heath, 126 Tex. 129, 86 S.W.2d 441 (1935) that where a dam across a navigable stream flooded land privately owned, the private owner could not deny the public the right to fish in the water over his land although the public had no right to use the banks.

On the other hand, since the general public would be entitled only to the use and enjoyment of the waters within the stream and not the dry bed thereof, we are of the opinion that the Texas Prison System could

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maintain a fence across the dry bed of a stream navigable in law though not navigable in fact, so long as such a fence did not constitute a nuisance and did not interfere with any legal right the public might have in and to said streams. Tyler v. Gonzales, supra.

SUMMARY

The Retrieve State Farm has no authority to run a fence across Buffalo Camp Bayou at a point entirely within the prison owned property, if such a fence would deprive the general public from the use and enjoyment of the waters contained therein. Such a fence could be maintained during the time there was no water in the bed of the stream so long as such a fence did not create a nuisance.

Yours very truly,

WILL WILSON  
Attorney General of Texas

By   
Robert O. Smith  
Assistant Attorney General

APPROVED:

OPINION COMMITTEE

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Larry Jones  
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REVIEWED FOR THE ATTORNEY  
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